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HONEYWELL INTERNATIONAL INC.

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

13 DEBORAH GETZ, et al.,

14 Plaintiffs,

15 v.

16 THE BOEING COMPANY, et al.,

17 Defendants.

Case No. CV 07-06396 CW

**DEFENDANT HONEYWELL  
INTERNATIONAL INC.'S NOTICE  
OF MOTION AND MOTION TO  
DISMISS PLAINTIFFS'  
COMPLAINT; MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT THEREOF**

Date: June 19, 2008  
Time: 2:00 p.m.  
Courtroom: 2  
Judge: Hon. Claudia Wilken

**NOTICE OF MOTION AND MOTION TO DISMISS**

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 19, 2008, at 2:00 pm, or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Claudia Wilken, United States District Court, Northern District of California, Oakland Division, Courtroom 2, 4th Floor, 1301 Clay Street, 400 South, Oakland, California 94612, Honeywell International Inc. ("Honeywell") will, and hereby does, move the Court for an order dismissing plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). The claims in this case arise from military operations which are considered to be nonjusticiable political questions and therefore must be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

This motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities; the accompanying Declarations and exhibits thereto of Joanna E. Herman and Marlin Kruse in Support of Honeywell's Motion to Dismiss; the pleadings and other files herein; and such other written and oral argument as may be presented to the Court.

Dated: April 29, 2008

MORRISON & FOERSTER LLP

By: /s/ James W. Huston  
James W. Huston

Attorneys for Defendant  
HONEYWELL INTERNATIONAL  
INC.

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**MISCELLANEOUS**

Dept. of Defense Instruction No. 6055.7..... 3

**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendant Honeywell International Inc. (“Honeywell”) hereby files this Memorandum of Points and Authorities in support of its motion to dismiss plaintiffs’ complaint under the political question doctrine.

**I. INTRODUCTION**

This case arises from the crash of a United States Army Special Operations Aviation Regiment MH-47E Chinook helicopter, serial number 92-00472 (the “subject helicopter”), on February 18, 2007, during a Special Operations Aviation Regiment (“SOAR”) mission in Afghanistan (the “Accident”). The crash took the lives of eight military personnel and injured fourteen military personnel.

At the time of the Accident, the subject helicopter and its military crew and passengers were involved in a combat mission in an active war zone in Afghanistan. The political question doctrine prohibits courts from becoming entangled in questions regarding military policy, including the death of military forces in a combat-like situation, as such issues are constitutionally committed to the Executive and Legislative Branches.

Plaintiffs’ claims cannot be adjudicated without the court determining the cause or causes of the Accident. Causal analysis in the context of a military combat accident necessarily involves examination of military decision-making in the planning, equipping, and execution of the mission. Indeed, defendants have asserted various defenses of superceding and intervening cause, fault apportionment, and product alteration/misuse that will require the Court to evaluate modifications of the helicopter by the U.S. Army’s Special Operations Aviation Regiment, the decision to fly the mission at a dangerously low altitude in formation and inclement weather over mountainous terrain, the maintenance of the helicopter by the U.S. Army, the U.S. Army’s fueling practices, and the U.S. Army flight crew’s training, preparation, performance, and qualifications. This Court lacks subject matter jurisdiction to hear this case as the plaintiffs’ claims arise from military operations, which are political matters within the dominion of the Executive and Legislative Branches. This case should be dismissed as nonjusticiable under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

## II. STATEMENT OF FACTS

In the early morning hours of February 18, 2007, the subject helicopter crashed in the Shahjoi District of the Zabul Province in Afghanistan while flying a mission in support of Operation Enduring Freedom. (Compl. at ¶ 1; Declaration of Joanna E. Herman in Support of Motion to Dismiss (“Herman Decl.”) at ¶¶ 2, 5, Exs. 1, 4.)<sup>1</sup> At the time of the Accident, the Zabul province was considered a “hotbed for militant supporters of the former Taliban regime who have stepped up attacks over the past year.” (*Id.* at ¶ 6, Ex. 5.) As the 160th Special Operations Aviation Regiment (Airborne) stated “[e]very night, the uniquely skilled and highly trained Night Stalker aviators and crew members perform the most challenging and dangerous missions in support of our Special Operations brothers.” (*Id.* at ¶ 5, Ex. 4.)

Operation Enduring Freedom involves troops from over 20 nations, including approximately 19,000 United States forces. (*Id.* at ¶ 15, Ex. 14.) “U.S. and coalition forces continue to engage Taliban remnants and other extremists and coordinate with the Pakistani military to bolster security along the Afghan-Pakistan border.” (*Id.*)

The subject helicopter “was part of a multi-aircraft flight carrying a quick-reaction force” in support of a Joint Special Operations Command task force mission. (*Id.* at ¶¶ 3, 6, Exs. 2, 5.) The subject helicopter was meant to provide CSAR (combat, search and rescue) coverage to several ongoing operations at the time of the Accident. (*Id.* at ¶ 4, Ex. 3.) The mission was cancelled and the quick-reaction force was returning to Bagram Air Base from Kandahar. (*Id.* at ¶¶ 3, 6, Exs. 2, 5.)

The subject helicopter was operated by the U.S. Army 160th Special Operations Aviation Regiment. (Declaration of Marlin Kruse (“Kruse Decl.”) at ¶ 4.) The unit, nicknamed the “Night Stalkers,” specializes in low-level night flying in combat and rescue missions, mostly in support of Army special forces troops. (Herman Decl. at ¶ 8, Ex. 7; *see also* Kruse Decl. at ¶ 5.) “The

<sup>1</sup> “Operation Enduring Freedom (OEF) is a multinational coalition military operation initiated in October 2001 to counter terrorism and bring security to Afghanistan in collaboration with Afghan forces. OEF operations led to the collapse of the Taliban regime and helped bring a measure of security and stability to Afghanistan for the first time in a generation.” (*Id.* at ¶ 15, Ex. 14.)



1 160<sup>th</sup>, and the Rangers, support Joint Special Operations Command, (JSOC) which is in charge of  
2 the most sensitive special operations missions.” (Herman Decl. at ¶ 6, Ex. 5.)

3 Immediately after the Accident, a combat search and rescue operation was launched to  
4 secure the Accident site and recover the passengers. (*Id.* at ¶¶ 6, 9, Exs. 5, 8.) After the subject  
5 helicopter crashed, it was destroyed by U.S. forces to ensure that enemy combatants were unable  
6 to retrieve any sensitive military data and to prevent possible exploitation of the site by terrorist  
7 groups. (Herman Decl. at ¶ 7, Ex. 6.)

8 The Accident took the lives of eight military personnel who died in the line of duty. (*See*,  
9 *e.g.*, *id.* at ¶10, Ex. 9.) Four of the decedents families have brought claims in this action. Scott  
10 Duffman was a member of the U.S. Air Force Special Operations, assigned to the 24th Special  
11 Tactics Squadron. The Department of the Air Force’s Report of Casualty states that Scott  
12 Duffman “died in a combat zone or from a terroristic or military action.” (*Id.* at ¶ 11, Ex. 10.)  
13 Kristofer Thomas was a member of the 75th Ranger Regiment and was serving as a member of a  
14 Site Security Team at the time of the Accident. (*Id.* at ¶ 12, Ex. 11.) Ryan Garbs was a grenadier  
15 and riflemen with the 75th Ranger Regiment at the time of the Accident. (*Id.* at ¶ 13, Ex. 12.)  
16 Travis Vaughn was a MH-47E Crew Chief and a member of the 160th U.S. Army Special  
17 Operations Aviation Regiment “Night Stalkers.” (*Id.* at ¶ 14, Ex. 13.)

18 As a result of the crash, fourteen military personnel were injured – five have brought  
19 claims in this action, as well as a claim by the wife of one of the injured military personnel. The  
20 injured include a crewman from the 160th SOAR, Air Force special operations combat  
21 controllers, and Army Rangers. (*See id.* at ¶ 6, Ex. 5.)

22 Following the Accident, the U.S. Army began an investigation to determine its cause.  
23 (Kruse Decl. at ¶ 6.) The military is required to “[i]nvestigate, report, and keep related records on  
24 accidental death, injury, occupational illness, and property damage for” all accidents resulting in  
25 injury to military personnel or property, as well as for accidents resulting in non-military property  
26 damage or injury if caused by military operations. Dept. of Defense Instruction No. 6055.7 at  
27 §§ 4, E2.1.7. Investigation related activities have occurred at the following U.S. Army  
28 installations: Fort Campbell, Kentucky (home of the 160th), Fort Rucker, Alabama (location of

1 the U.S. Army Combat Readiness Center, the U.S. Army's principal aviation accident  
 2 investigating authority), Redstone, Alabama, and the Corpus Christi Army Depot, Texas. (Kruse  
 3 Decl. at ¶ 6.)

4 The U.S. Army recovered the engines, engine control system components, and other  
 5 component parts from the subject helicopter. These components were transported to the United  
 6 States from Afghanistan under the control of the 160th. (*Id.* at ¶ 7.) The recovered engines are in  
 7 the custody of the 160th located in Fort Campbell, Kentucky. (*Id.* at ¶¶ 7-8.) The U.S. Army's  
 8 investigation into the cause of the Accident is still continuing and no final investigation report has  
 9 been issued to date.

10 Plaintiffs sued Honeywell, The Boeing Company, Goodrich Corporation, BF Goodrich  
 11 Aerospace, Chandler Evans Control Systems and General Electric<sup>2</sup> seeking damages for wrongful  
 12 death, bodily injuries and loss of consortium based on theories of negligence, strict product  
 13 liability, and breach of express and implied warranty.

### 14 **III. STANDARD FOR MOTION TO DISMISS**

15 Federal courts generally determine issues of subject matter jurisdiction before considering  
 16 a case on its merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96 (1998); *Scott v.*  
 17 *Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653-54 (9th Cir. 2002). A Rule 12(b)(1) motion  
 18 challenges the district court's subject matter jurisdiction.<sup>3</sup> *Corrie v. Caterpillar, Inc.*, 503 F.3d  
 19 974, 982 (9th Cir. 2007). The Ninth Circuit has held that the political question doctrine is a  
 20 jurisdictional limitation imposed on the Courts by the Constitution. *Id.* at 981 (motion must be  
 21 decided pursuant to a Rule 12(b)(1) motion). The Court concluded "that if a case presents a  
 22 political question, we lack subject matter jurisdiction to decide that question." *Id.* at 982.

23 The burden of proof on a rule 12(b)(1) motion is on the party averring jurisdiction, in this  
 24 case the plaintiffs. *See Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996); *see also*

25 \_\_\_\_\_  
 26 <sup>2</sup> General Electric has been voluntarily dismissed by Plaintiffs. (Docket No. 33.)

27 <sup>3</sup> Lack of subject matter jurisdiction cannot be waived by the parties "[i]f the court  
 28 determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."  
 Fed. R. Civ. P. 12(h)(3).

1 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (in effect the court  
 2 presumes lack of jurisdiction until the plaintiff proves otherwise). A Rule 12(b)(1) motion has  
 3 two possible forms: (1) a “facial attack” on the complaint that requires the court to assess whether  
 4 the plaintiff has alleged a basis for subject matter jurisdiction, or (2) a “factual attack,” which  
 5 challenges the truth of the allegation of subject matter jurisdiction. *Safe Air v. Meyer*, 373 F.3d  
 6 1035, 1039 (9th Cir. 2004).

7 Under a “factual attack,” the court “need not presume the truthfulness of the plaintiffs’  
 8 allegations,” *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000), and may resolve factual disputes.  
 9 *See Thornhill Publ’g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).  
 10 Moreover, “[i]n resolving a factual attack on jurisdiction, the district court may review evidence  
 11 beyond the complaint.” *Safe Air*, 373 F.3d at 1039. In fact, the court “may review *any*  
 12 evidence . . . to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v.*  
 13 *United States*, 850 F.2d 558, 560 (9th Cir. 1988) (emphasis added). This includes testimony,  
 14 affidavits, matters of public record, and matters subject to judicial notice. *See White*, 227 F.3d at  
 15 1242; *McCarthy*, 850 F.2d at 560; *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th  
 16 Cir. 1986), *abrogated on other grounds*, *Astoria Fed. Savs. & Loan Ass’n v. Solimino*, 501 U.S.  
 17 104 (1991) (“On a motion to dismiss a court may take judicial notice of facts outside the  
 18 pleadings.”). The Ninth Circuit has specifically held that, when resolving a motion to dismiss  
 19 based on the political question doctrine, matters outside the pleadings, including declarations and  
 20 documents attached to declarations, may be considered. *See Corrie*, 503 F.3d at 982.

21 “Once the moving party has . . . present[ed] affidavits or other evidence properly brought  
 22 before the court, the party opposing the motion must furnish affidavits or other evidence  
 23 necessary to satisfy its burden of establishing subject matter jurisdiction.” *Savage v. Glendale*  
 24 *Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

#### 25 **IV. THIS COURT MUST DISMISS PLAINTIFFS’ COMPLAINT AS** 26 **NONJUSTICIABLE UNDER THE POLITICAL QUESTION DOCTRINE**

27 The United States Constitution restricts courts’ jurisdiction to justiciable cases or  
 28 controversies. U.S. Const. Art. III, § 2, cl. 1 (the Constitution limits the federal judicial power to

1 designated “cases” and “controversies”); *see also Baker v. Carr*, 369 U.S. 186, 199 (1962). The  
 2 federal courts are limited to adjudicating questions presented in an adversarial context and are not  
 3 allowed to intrude into areas committed to other branches of government. *Flast v. Cohen*, 392  
 4 U.S. 83, 94-95 (1968). “Justiciability is the term of art employed to give expression to this dual  
 5 limitation ...” *Id.* at 95.

6 The political question doctrine is one such area in which the U.S. Supreme Court has held  
 7 that disputes or cases are nonjusticiable. The doctrine arises from two independent constitutional  
 8 principles: (1) the separation of powers of the three independent branches of government and  
 9 (2) the limits of judicial capabilities and resources. *See Banner v. United States*, 303 F. Supp. 2d  
 10 1, 9 (D.D.C. 2004), *aff’d*, 428 F.3d 303 (D.C. Cir. 2005). The political question doctrine  
 11 prohibits courts from interfering in political matters that are within the dominion of another  
 12 branch of government. *Id.*; *see also Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221,  
 13 230 (1986); *Farmer v. Rountree*, 252 F.2d 490, 491 (6th Cir. 1958). “The nonjusticiability of a  
 14 political question is primarily a function of the separation of powers.” *Baker*, 369 U.S. at 210;  
 15 *see Corrie*, 503 F.3d at 980. The Supreme Court in *Baker* laid out six independent tests for  
 16 determining whether courts should defer to the political branches on an issue, thereby dismissing  
 17 a case as a nonjusticiable political question:

18 [1] a textually demonstrable constitutional commitment of the issue  
 19 to a coordinate political department; or [2] a lack of judicially  
 20 discoverable and manageable standards for resolving it; or [3] the  
 21 impossibility of deciding without an initial policy determination of  
 22 a kind clearly for nonjudicial discretion; or [4] the impossibility of a  
 23 court's undertaking independent resolution without expressing lack  
 of the respect due co-ordinate branches of government; or [5] an  
 unusual need for unquestioning adherence to a political decision  
 already made; or [6] the potentiality of embarrassment from  
 multifarious pronouncements by various departments on one  
 question.

24 *Baker*, 369 U.S. at 217; *see also Corrie*, 503 F.3d at 980. Courts have held that the “presence of  
 25 *any one of these factors* is sufficient to render an issue nonjusticiable.” *Banner*, 303 F. Supp. 2d  
 26 at 9 n.9 (emphasis added). As explained below, the facts of this case dictate that plaintiffs’ claims  
 27 should be dismissed under *each* of the six independent *Baker* tests.

Moreover, the district courts of California have previously dealt with similar claims involving the death or injury of individuals during military combat operations implicate the political question doctrine. *See Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980) (claims based on the conduct of military operations deemed nonjusticiable political question); *see also Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) (death of armed forces in a combat-like situation). The facts of this case dictate that plaintiffs' complaint be dismissed pursuant to the political question doctrine.

**A. Plaintiffs' Complaint Must Be Dismissed Because The Claims Arise Out Of Military Operations Which Are Constitutionally Committed To The Executive And Legislative Branches**

The first independent test under *Baker* upon which a case may be identified as nonjusticiable pursuant to the political question doctrine is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217; *see also Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 640 (S.D. Tex. 2006) (first factor considered to be the most important of the factors).

This case is nonjusticiable under the political question doctrine as it involves claims for wrongful death and injuries resulting from the crash of a U.S. Army Special Operations helicopter during a Special Operations mission in Afghanistan. *See Rappenecker*, 509 F. Supp. at 1030 (the decision to employ military force is nonjusticiable as it is committed to the Executive Branch); *see also Bentzlin*, 833 F. Supp. at 1497 (death of armed forces in a combat-like situation). Here, the control of the military is textually committed to the executive and legislative branches by the Constitution and cannot be intruded upon by the judiciary. The Constitution clearly confers authority over the military to the executive and legislative branches of government. U.S. Const. Art. I, § 8, cls. 11-16 (granting Congress the power to declare war and provide for, organize, arm, maintain, and govern the military); U.S. Const. Art. II, § 2 (providing that the President is the Commander-In-Chief of the armed forces); *see also United States v. Stanley*, 483 U.S. 669, 682 (1987) (Constitution granted authority over the Army, Navy, and militia to the political branches).

When foreign policy and military affairs are involved in cases, the judiciary has a history of abstention because the political question doctrine mandates that the issues are nonjusticiable.

1 *See Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (“matters intimately related to  
2 foreign policy and national security are rarely proper subjects for judicial intervention”) (*quoting*  
3 *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

4 The training, equipping, and control of military forces are of the types of governmental  
5 action intended by the Constitution to be left to the political branches. *See Gilligan v. Morgan*,  
6 413 U.S. 1, 10 (1973). Training procedures implicate military decision-making to the point of  
7 preventing courts from hearing these cases. *Aktepe*, 105 F.3d at 1404. In *Aktepe*, the Eleventh  
8 Circuit dismissed a case involving political question related to the accidental firing of an armed  
9 missile during a simulated event. *Id.* The court held that “the Constitution reserves to the  
10 legislative and executive branches responsibility for developing military training procedures that  
11 will ensure the combat effectiveness of our fighting forces.” *Id.* at 1403. As a result, the political  
12 question doctrine dictated that the Eleventh Circuit not assess the plaintiffs’ claims that failure of  
13 military communication caused the incident.

14 Military strategy decisions are also considered to be nonjusticiable because courts cannot  
15 resolve issues of causation without inquiring into all other causes, including those dedicated to the  
16 executive and legislative branches. *Rappenecker*, 509 F. Supp. at 1030 (“The textual  
17 commitment to the President as commander in chief of authority for military decisions entails that  
18 his decisions may be implemented without judicial scrutiny”); *Bentzlin*, 833 F. Supp. at 1497-  
19 1498 (court held case to be nonjusticiable because deaths occurred during the Persian Gulf War  
20 during combat and the conduct of war is committed to the Executive and Legislative Branches);  
21 *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134, 1142 (D. Conn. 1990), *aff’d*, 935 F.2d  
22 544 (2nd Cir. 1991) (suit dismissed based on political question doctrine because the complaint  
23 posed political questions regarding the rules of engagement and the standing orders surrounding a  
24 military incident); *Fisher*, 454 F. Supp. 2d at 641 (“the court finds that it cannot try a case set on a  
25 battlefield during war-time without an impermissible intrusion into powers expressly granted to  
26 the Executive by the Constitution”); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL  
27 2521326, at \*\*6-7 (S.D. Tex. Aug. 30, 2006) (dismissing complaint based on the first factor of  
28 the *Baker* case, among others, and holding that the issue of control of access to a military base is



clearly within the Constitutional powers granted to the President and Congress); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1281 (M.D. Ga. 2006) (case presents a nonjusticiable political question when soldier was negligently killed in a car accident by a government contractor in Iraq). Thus, where courts are asked to analyze and assess the decisions of the military, the political question doctrine is implicated.

Here, the political question doctrine is implicated due to the very facts underlying plaintiffs' claims—the injuries and deaths of military personnel arising out of the crash of a United States Army Special Operations MH-47E Chinook helicopter during a Special Operations Aviation Regiment combat mission in Afghanistan in support of Operation Enduring Freedom. Plaintiffs' claims and the Accident itself are political questions dedicated to the executive branch because the subject helicopter was operated by members of the United States Army, pursuant to a mission in support of Operation Enduring Freedom. (Herman Decl. at ¶ 2, Ex. 1.)

The subject helicopter was being operated in an active war zone at the time of the Accident. (*See id.* at ¶ 3, Ex. 2.)<sup>4</sup> The Accident occurred in the Zabul Province in Afghanistan, which was considered a “hotbed for militant supporters of the former Taliban regime who had stepped up attacks over the past year.” (Compl. at ¶ 1; Herman Decl. at ¶¶ 2, 6, Exs. 1, 5.) There can be no dispute that the Accident occurred during a potentially dangerous combat mission. The military regiment operating the subject helicopter at the time of the Accident, the 160th Special Operations Aviation Regiment, stated “[e]very night, the uniquely skilled and highly trained Night Stalker aviators and crew members perform the most challenging and dangerous missions in support of our Special Operations brothers.” (Herman Decl. at ¶ 5, Ex. 4.)

The subject helicopter was supposed to participate in a combat, search and rescue mission when the mission was cancelled; shortly afterwards the Accident occurred. (*Id.* at ¶¶ 4, 3, Exs. 3, 2.) In order for this Court to hear plaintiffs' claims it will have to examine the orders of the military troops aboard the subject helicopter, to determine the nature of the combat activity, to

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<sup>4</sup> Thousands of U.S. forces are deployed in Southeastern Afghanistan where they have a base under NATO control. (*Id.* at ¶ 3, Ex. 2.) The Zabul province is described as a “hotbed for militant supporters of the former Taliban regime.” *Id.*

1 consider the day-to-day procedures, training, and operations involved in a combat search and  
2 rescue mission and to analyze whether appropriate tactical decisions were made during this  
3 mission. These tactical decisions and evaluations are legislative and executive branch decisions  
4 and are nonjusticiable issues that cannot be decided by this Court. *See Bentzlin*, 833 F. Supp. at  
5 1497 (precedent establishes that orders received by pilots and ground troops during active combat  
6 are considered political questions, and are thus nonjusticiable); *Aktepe*, 105 F.3d at 1403  
7 (delicacy of international conflicts are entrusted, by the Constitution, to the political branches of  
8 government); *see also Corrie*, 503 F.3d at 983 (the decision to provide military aid to a foreign  
9 country implicates the political question doctrine).

10 This case would also require an evaluation of Army (and particularly the Special  
11 Operations Unit) flight training, emergency flight procedures, and proper conduct of a military  
12 flight in combat to determine whether proper procedures were followed during this flight.  
13 Procedures involving military training, however, have been found to be nonjusticiable. *Aktepe*,  
14 105 F.3d at 1403. Plaintiffs' complaint thus clearly implicates the first *Baker* test: a constitutional  
15 commitment to a coordinated political department in the military and governance of the military.  
16 The oversight of the military in this case (and in general) is specifically granted to the executive  
17 and legislative branches by the Constitution and cannot be intruded on by the judiciary. Because  
18 this case meets the first independent *Baker* test, dismissal of plaintiffs' complaint is required  
19 pursuant to Rule 12(b)(1). *See id.* at 1402-1403.

20 **B. A Lack Of Judicial Standards Requires Plaintiffs' Complaint Be**  
21 **Dismissed**

22 The second independent test of *Baker* is whether judicially discoverable and manageable  
23 standards exist for resolving the questions raised by the suit. *See Baker*, 369 U.S. at 217; *Aktepe*,  
24 105 F.3d at 1404. In this case, no judicial standards exist for resolving plaintiffs' claims. "One  
25 of the most obvious limitations [on a court] . . . is that judicial action must be governed by  
26 *standard, by rule.*" *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (emphasis in original). Courts  
27 must determine whether they have the legal tools to make rulings in certain arenas. *See Alperin v.*  
28 *Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005). Such standards are particularly difficult where,



1 as here, courts must examine Army decisions, an area “not subject to judicial second-guessing.”  
2 *See In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 204, 206 (2d. Cir. 1987). In general, when  
3 dealing with military issues, the Supreme Court noted “it is difficult to conceive of an area of  
4 governmental activity in which the courts have less competence.” *Gilligan*, 413 U.S. at 10.

5 Courts recognize that military decisions result in a complex and subtle balancing of many  
6 technical military considerations, including the trade-off between safety and combat  
7 effectiveness. *Aktepe*, 105 F.3d at 1404. Although courts may hear some lawsuits involving the  
8 military, complaints by service members (as opposed to civilians) involving decisions made in the  
9 heat of battle are generally considered to be judicially unmanageable, as courts lack standards  
10 “with which to assess whether reasonable care was taken to achieve military objectives while  
11 minimizing injury and loss of life.” *Id.*; *see also Zuckerbraun*, 755 F. Supp. at 1142 (courts are  
12 considered ill-equipped to evaluate the risks taken to achieve tactical objectives against the  
13 exposure of military personnel to danger). “[C]ourts lack standards with which to judge whether  
14 reasonable care was taken to achieve tactical objectives while minimizing injury and loss of life.”  
15 *Rappenecker*, 509 F. Supp. at 1030; *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d  
16 1315, 1322 (M.D. Fla. 2006), *aff’d*, 502 F.3d 1331 (11th Cir. 2007) (“Courts have no guidepost  
17 with which to evaluate military strategy and they cannot apply traditional standards of care to  
18 war”). Most recently, the Eleventh Circuit in the *McMahon v. Presidential Airways, Inc.* case  
19 held that where cases involve “a sui generis situation such as military combat or training, ...  
20 courts are incapable of developing judicially manageable standards.” *See McMahon v.*  
21 *Presidential Airways, Inc.*, 502 F.3d 1331, 1364 (11th Cir. 2007).

22 When evaluating a claim’s justiciability, the key is whether the product’s performance can  
23 be assessed without questioning the wisdom of military operations and decision making. *See*  
24 *McMahon*, 460 F. Supp. at 1324. For example, if a plaintiff’s claim requires analysis of decisions  
25 made by armed services personnel during military operations, then the political question doctrine  
26 is implicated and the case should be dismissed. *Rappenecker*, 509 F. Supp. at 1030; *McMahon*,  
27 460 F. Supp. at 1322; *see Norwood v. Raytheon Co.*, 455 F. Supp. 2d 597, 601 (W.D. Tex. 2006)  
28 (inquiry made into rules of engagement during battle implicated the political question doctrine);

1 *Smith*, 2006 WL 2521326, at \*6 (case was dismissed as nonjusticiable under the political question  
2 doctrine when court determined that courts lack expertise to determine whether reasonable care  
3 was taken in military context); *Whitaker*, 444 F. Supp. 2d at 1282.

4 Plaintiffs' complaint involves allegations regarding American soldiers killed or injured  
5 during military operations. The complaint thus raises political questions because analyzing and  
6 understanding the causes of this Accident would require an examination of the Army officers'  
7 actions and reactions taken during the mission in an active combat zone, as well as military  
8 decisions in general. Whatever military exigencies and requirements intruded into the conduct of  
9 this flight are outside of the Court's ability to evaluate. *See DaCosta v. Laird*, 471 F.2d 1146,  
10 1155 (2nd Cir. 1973) (courts that are "deficient in military knowledge" and lacking information  
11 upon which to assess military operations are not able to assess the nature of military operations  
12 from thousands of miles from the field of action). For a court to be asked to determine whether  
13 the 160th Night Stalkers followed appropriate military commands is beyond judicial resources  
14 and the bounds of judicial knowledge and expertise; nor is this Court in a position to decide the  
15 correct procedures for combat search and rescue missions. The Court lacks the ability necessary  
16 to decide whether the Army should have ordered the mission that the subject helicopter was  
17 involved in at the time of the Accident. Courts cannot and should not be asked to apply the  
18 reasonable standard of care to actions taken by military personnel in combat zones, as they are  
19 without guidelines to evaluate military strategy and cannot apply traditional standards of care to  
20 war. *McMahon*, 460 F. Supp. 2d at 1322. Courts are thus unable to balance several possible  
21 causes of the crash of a combat helicopter and therefore cannot possibly do justice to any of the  
22 defendants before them. Therefore, plaintiffs' claims implicate the political question doctrine and  
23 their complaint must be dismissed.

24 **C. It Is Impossible To Decide This Case Without An Initial Policy**  
25 **Determination of Non-Judicial Discretion**

26 The third independent test under *Baker*, the impossibility of deciding the case without an  
27 initial policy determination of a clear non-judicial discretion, also applies in this case. *See Baker*,  
28 369 U.S. at 217. Courts have held that this test looks at whether resolving the case requires courts

1 to make policy decisions generally reserved for military discretion. *Aktepe*, 105 F.3d at 1404.  
 2 This ground for dismissal recognizes that there are certain responsibilities of the military that  
 3 cannot be transferred to the judiciary including the merits of “methods of training, equipping, and  
 4 controlling military forces with respect to their duties under the Constitution.” *Id.* It is  
 5 inappropriate, under the political question doctrine, for courts to undertake analysis of military  
 6 decisions. *Id.*; *see also Fisher*, 454 F. Supp. 2d at 644 (case dismissed for nonjusticiable issue  
 7 under political question doctrine when entire Executive Branch policies would potentially be  
 8 under scrutiny); *Smith*, 2006 WL 2521326, at \* 6 (case was dismissed because court would have  
 9 had to inappropriately substitute its judgment for that of the military).

10 Here, the Court would need to determine: (1) how the special operations helicopter was  
 11 modified and outfitted by the Army after its purchase from Boeing, (2) the standard operating  
 12 procedures for these helicopters by the 160th SOAR including low level flying in mountainous  
 13 terrain with NVDs (Night Vision Devices), (3) the wisdom of a three helicopter flight formation  
 14 in the dark mountains of Afghanistan, (4) the Army’s operational decisions on operation of the  
 15 accident helicopter in flight regimes that left little room for error or response to in-flight  
 16 emergencies, (5) the wisdom of maintenance decisions made by the Army to keep the accident  
 17 helicopter in an in-flight status even if it increased the risk of an aborted mission, (6) whether the  
 18 military pilots were sufficiently trained, (7) whether the military sufficiently briefed the pilots for  
 19 their mission, (8) whether the military crew was adequately rested prior to flight, among other  
 20 factors, and (9) the appropriateness and the decision making process behind the Army’s  
 21 destruction of the subject aircraft after the Accident. These all involve policy determinations  
 22 made by the military during a time of war. This is an area clearly not appropriate for judicial  
 23 determination, when the military is capable of making its own policy determinations, including  
 24 balancing competing factors outside of normal experience, that involve non-judicial discretion.

25 **D. Plaintiffs’ Complaint Should Also Be Dismissed Pursuant To The**  
 26 **Remaining Independent Tests Under *Baker***

27 While only one of the independent *Baker* tests is required to establish that there is a  
 28 nonjusticiable political question, all six tests are met in this case. *See Banner*, 303 F. Supp. 2d at

9 n.9; *see also Corrie*, 503 F.3d at 980. The fourth *Baker* test (impossibility of a court undertaking independent resolution without expressing lack of respect to a coordinate branch) is implicated as the judiciary cannot become enmeshed in second guessing military decisions made in the heat of war. *See Baker*, 369 U.S. at 217. The fifth test (an unusual need for unquestioning adherence to a political decision) is also evident as the judiciary should not question combat decisions made by the military. *See id.* Finally, the sixth test (the potentiality of political embarrassment) may be implicated if the judiciary begins to question the decisions of military strategists and decision makers and opens each combat death to the scrutiny of a federal court in a lawsuit by survivors. *See id.* Thus, these additional tests support a finding that plaintiffs' claims are nonjusticiable under the political question doctrine and should be dismissed pursuant to Rule 12(b)(1).

#### V. CONCLUSION

For the foregoing reasons, Honeywell respectfully requests that plaintiffs' complaint be dismissed with prejudice pursuant to Rule 12(b)(1).

Dated: April 29, 2008

MORRISON & FOERSTER LLP

By: /s/ James W. Huston  
James W. Huston

Attorneys for Defendant  
HONEYWELL INTERNATIONAL INC.

**CERTIFICATE OF SERVICE**

I, James W. Huston, hereby certify that on April 29, 2008, I caused to be electronically filed a true and correct copy of the attached **DEFENDANT HONEYWELL INTERNATIONAL INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record for Plaintiffs:

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I also served the following party by overnight mail [Fed. Rule Civ. Proc. rule 5(b)] by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows, for collection by UPS, at 12531 High Bluff Drive, Suite 100, San Diego, California, 92130-2040 in accordance with Morrison & Foerster LLP's ordinary business practices.

I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited in a box or other facility regularly maintained by UPS or delivered to an authorized courier or driver authorized by UPS to receive documents on the same date that it (they) is are placed at Morrison & Foerster LLP for collection.

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11 Executed at San Diego, California, on this 29<sup>th</sup> day of April, 2008.

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